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No. 78-542

In the Supreme Court of the United States

OCTOBER TERM, 1978

TAMA MEAT PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

JOHN S. IRVING
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARJORIE S. GOFREED
Attorney
National Labor Relations Board
Washington, D.C. 20570

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A-1 to A-4) is reported at 575 F. 2d 661. The decision and order of the National Labor Relations Board (Pet. App. A-9 to A-10) are reported at 230 N.L.R.B. 116.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-5 to A-8) was filed on July 5, 1978. The petition

for a writ of certiorari was filed on September 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by failing to transfer employee Richard Thomas to the position of backsaw operator, and by thereafter suspending and discharging him because of his union activities.

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), is set forth in pertinent part at Pet. 3.

STATEMENT

1. Richard Thomas became petitioner's employee in 1971 and began work on its meat processing line. In 1975 Thomas initiated an organizational campaign on behalf of the Amalgamated Meat Cutters and Butcher Workmen of North America ("the Union"). He solicited other employees to sign authorization cards, wrote a letter to fellow employees urging them to vote for the Union, served as an elected shop steward, and was the only employee who continued to wear his steward badge and other Union insignia after the ensuing representation election (Pet. App.

A-15; A. 109, 317-318, 393).[1] During this period, Thomas received two warning notices accusing him of spreading a false rumor and physically threatening a co-worker (Pet. App. A-14 n.2). The Board subsequently found that the accusations were untrue and the notices were issued because of Thomas' union activities, in violation of Section 8(a)(1) of the Act (see note 1, *supra*). Apart from those notices Thomas had never received any adverse comments about his performance on the job (Pet. App. A-15).

On July 1, 1976, the Company posted a notice of a job vacancy for a backsaw operator, its highest paid classification (Pet. App. A-23 to A-24). The job was posted on the day it became vacant pursuant to company practice (Pet. App. A-24). Arden Vestel, who had the highest seniority among those bidding for the

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[1] The Union lost the election. Thereafter, it filed unfair labor practice charges with the Board, alleging, *inter alia*, that the Company had committed acts of interference, restraint and coercion during the election campaign.

On August 10, 1976, the Administrative Law Judge, whose decision was upheld by the Board, issued a decision and recommended order, finding that the Company had violated Section 8(a)(1) of the Act by unlawfully giving Richard Thomas two written warnings of disciplinary action because of his union activities, by announcing an unlawful wage increase, by impressing employees with the futility of selecting the Union as their collective bargaining representative, by stating that it would not bargain with the Union, by threatening employees with loss of employment and other benefits in the event of a strike, and by unlawfully interrogating employees concerning their union sympathies (Pet. App. A-14).

"A." references are to the joint appendix in the court of appeals.

job, was selected for the position (Pet. App. A-24). Dale Albee was next in seniority but was ineligible to bid, and Thomas and Darrel Davis ranked third and fourth, respectively (Pet. App. A-25 n.7). After serving in the job for about two weeks on a trial basis, Vestel, on July 19, informed his supervisor that he did not want the job (Pet. App. A-25). However, the Company did not then post the job for bidding and Thomas received no opportunity to bid for it (Pet. App. A-25 to A-26).

That same day, July 19, Thomas was summoned to Plant Superintendent Donald Derham's office. As he entered the office, Thomas inquired, "Another one of those deals, huh?" and Derham replied, "Yes, I guess so, sit down" (Pet. App. A-29; A. 121-122).. Derham then nodded toward Industrial Relations Director Bristol, who told Thomas, "Rich, we are authorized to inform you, at this time, that you have been placed on indefinite suspension" (Pet. App. A-29; A. 122, 191). Thomas asked why he was being suspended and Bristol responded, "We have not been authorized to give you a reason at this time" (Pet. App. A-29; A. 122, 182).

The next day, July 20, Bristol sought out Foreman Stanley Sasker and Leadman Jim Kesl and questioned them about an incident that had occurred on July 16 in which Thomas had advised a fellow employee on the production line not to manually pull carcasses along the line when the automatic mechanism broke down (Pet. App. A-35). Sasker and Kesl also told Bristol about an incident that had occurred

around July 12 in which Thomas as well as several other employees had advised a sick employee, whose presence was needed to maintain production, to go home (Pet. App. A-29, A-41). Neither Sasker nor Kesl had reported the matter to their supervisors or reprimanded Thomas for it at that time (Pet. App. A-29). Bristol also obtained from his files a memorandum noting that another employee had accused Thomas of calling him obscene names (Pet. App. A-31, A-43). Bristol did not question Thomas during this investigation (Pet. App. A-52; A. 182-183).

On July 22, the Company sent Thomas a letter, signed by Foreman Sasker, which stated, *inter alia* (Pet. App. A-30):

> During the past week of July 12-16, 1976 you told a fellow employee not to move the cattle ahead to fill the chain, causing a slow down in production. You also convinced another employee to go home sick after he had indicated to his supervisor he would work out the day. You also have been guilty of disruptive conduct by addressing derogatory remarks to other employees. This behavior cannot be condoned. You are hereby discharged immediately.

On July 26, Supervisor Rutledge called employee Vestal to his office and had him sign a statement that he was rejecting the backsaw job as of that date (Pet. App. A-24, A-26; A. 150). That same day, the Company assigned the backsaw job to Davis (Pet. App. A-26; A. 243-245).

2. The Board, adopting the decision of the Administrative Law Judge, found that the reasons stated in the July 22 letter for discharging Thomas were pretextual and concluded that petitioner denied Thomas a transfer to the higher rated job, and thereafter suspended and discharged him, because of his adherence to the Union (Pet. App. A-43 to A-53).

As to the name-calling incident, the Board noted that petitioner had admitted that the incident was not a ground for discharge, but only "an aggravating circumstance," that no action was taken at the time the incident occurred, and that there was admittedly "longstanding and widespread name calling throughout the plant" (Pet. App. A-43 to A-44, A-31). As to the incident in which Thomas advised a fellow employee who was sick to go home, the Board noted that other employees "said the same thing to [the sick employee] in front of [Leadman] Kesl at the same time and received no discipline whatever from [the Company] on account of such suggestions much less discharge as was the case with Thomas" (Pet. App. A-47, A-41). Concerning the incident in which Thomas advised an employee not to pull carcasses manually, the Board pointed out that similar remarks of two other employees that also could have led to a slowdown in production were not even reported to management (Pet. App. A-48 to A-49). The Board also noted that petitioner's failure to react significantly to Thomas' asserted misconduct when it occurred cast further doubt on its contention "that the

misconduct was substantial enough to form the basis of suspension and later discharge" (Pet. App. A-49).

The Board also took into consideration petitioner's refusal to give Thomas any explanation for his suspension and its failure to question him during the investigation which led to his discharge (Pet. App. A-51 to A-52). Finally, the Board took into account petitioner's previous unfair labor practices, particularly those directed at Thomas as a result of his union activities. The Board acknowledged, however, that "such evidence [is] by no means * * * dispositive." (Pet. App. A-47).

3. The court of appeals upheld the Board's decision and enforced its reinstatement order with one minor modification not pertinent here.[2] The court concluded that the record amply supported the Board's finding that petitioner suspended, discharged and refused to transfer Thomas to a higher rated job because of his union activities. The court relied on a number of specific factors: petitioner's prior unfair labor practices; Thomas' continuous union activities and participation in filing unfair labor practice charges; Thomas' excellent work record and the absence of any prior reprimand for deficiencies in his work or attendance; petitioner's failure to give Thomas any reason for his suspension; the insubstantial nature of the incidents cited as reasons for his

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[2] The court found that the backsaw operator's vacancy did not occur until a few days after July 19 and that backpay at the higher rate should date from that time (Pet. App. A-3 to A-4).

discharge (one of the incidents involving conduct in which other employees had engaged but were not reprimanded or suspended); the fact that no complaint was made to Thomas when the incidents occurred; and petitioner's failure to question Thomas during the course of its investigation (Pet. App. A-2 to A-3).

In response to petitioner's assertion that the Board's order was based solely on its prior unfair labor practice findings, the court stated (Pet. App. A-3):

> * * * an adjudication of bad faith on an earlier occasion is not alone substantial evidence of bad faith to support the Board's finding of animosity towards the union. Here, the prior adjudication does not stand alone; it is strongly supported by the other factors cited. In such circumstances, the prior adjudication can be used as evidence of present hostility. *N.L.R.B.* v. *Clinton Packing Co., Inc.*, 468 F.2d 953 (8th Cir. 1972).

ARGUMENT

The question that petitioner raises for review (Pet. 2)—whether a violation of the Act may be sustained where there is "credited evidence of lawfulness of [the Company's] motive and conduct, and the evidence of unlawful intent is derived *solely* from the findings of improper motive adduced in a previous and unrelated unfair labor practice proceeding"—is not presented on this record. The Board did not credit the Company's assertion of a lawful motive. Moreover, both the Board and the court of appeals expressly relied on evidence in addition to the previous

unfair labor practices in determining that the Company's action against Thomas was unlawfully motivated. Thus, the only issue presented here is whether substantial evidence supports the Board's findings of unlawful motivation. That question presents no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 23. In any event, as shown on pages 2-5, *supra*, the record amply supports the Board's finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN S. IRVING
General Counsel

WADE H. MCCREE, JR.
Solicitor General

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

MARJORIE S. GOFREED
Attorney
National Labor Relations Board

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